MOTION FILED
DEC 1 - 1998

(3)

No. 98-721

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

PLAYERS INTERNATIONAL, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CURIAE VALLEY BROADCASTING COMPANY AND SIERRA BROADCASTING COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI BEFORE JUDGMENT

GERALD S. ROURKE
7501 Hackamore Drive
Potomac, MD 20854
(301) 983-0776
Counsel for Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

12pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-721

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

PLAYERS INTERNATIONAL, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Third Circuit

---

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Valley Broadcasting Company ("Valley") and Sierra Broadcasting Company ("Sierra"), by undersigned counsel, hereby move the Court for leave to file an amicus curiae brief in the above captioned proceeding. In support thereof the following is shown.

Petitioner United States has consented to the filing of an amicus curiae brief by Valley and Sierra in this proceeding but respondent Players International, Inc., et al., has withheld consent.

Valley and Sierra are interested parties in this case and the Court should grant leave for them to file a brief as amici curiae. Valley and Sierra are broadcasters who are the licensees of television stations KVBC-TV, Las Vegas, Nevada, and KRNV-TV, Reno, Nevada, respectively, and were the plaintiffs in the case of *Valley Broadcasting Company v. United States,* 107 F.3d 1328 (9th Cir. 1997), cert. denied, 118 Sup. Ct. 1050 (1998). In *Valley* the 9th Circuit held that 18 U.S.C. Sec. 1304, as amended, which prohibits the broadcast of advertising for commercial casino gambling, violates the First Amendment. In *Greater New Orleans Broadcasting Association, Inc. v. United States,* 149 F.3d 334 (5th Cir. 1998), petition for certiorari filed September 2, 1998, No. 98-387, the 5th Circuit considered the same question and reached a contrary result, upholding the constitutionality of 18 U.S.C. Sec. 1304, as amended, and holding that the Government may prohibit the broadcast of advertising for commercial casino gambling. Thus there is a conflict between the circuits in *Valley* and *Greater New Orleans* which presumably will have to be resolved by this Court at some point.

By its petition for certiorari before judgment in this case, *Players International, Inc. v. United States,* 988 F. Supp. 497 (D. NJ 1998), the Government seeks to bypass the 3rd Circuit Court of Appeals and have this Court resolve the constitutional conflict between *Valley* and *Greater New Orleans* in *Players.*

Certiorari having been denied in *Valley,* that decision is now final, and Valley and Sierra, as well as all other broadcasters in the 9th Circuit, are now free to carry advertising for commercial casino gambling.[1] The only

---

[1] Following the district court decision in *Valley,* the FCC on June 2, 1993, issued a Public Notice (DA 93-626) that it would not enforce the federal ban on commercial casino advertising against broadcasters in the State of Nevada only, and following the 9th Circuit decision upholding the district court ruling, the FCC on

way the outcome of the *Valley* case now can be reversed is by this Court's reaching a contrary result on the constitutional question decided there in either *Greater New Orleans* or *Players*. Thus Valley and Sierra have a clear interest in this Court's consideration of the constitutional question first raised in *Valley*, and in the question whether the Court should grant certiorari before judgment and consider that question in the *Players* case.

WHEREFORE, the premises considered, the Court is respectfully requested to grant leave to Valley and Sierra to file the attached brief as amici curiae.

Respectfully submitted,

GERALD S. ROURKE
7501 Hackamore Drive
Potomac, MD 20854
(301) 983-0776
Counsel for Amici Curiae

September 17, 1997, issued a Public Notice (DA 97-2014) that it would not enforce the ban against broadcasters in the 9th Circuit only. (A comparable Public Notice applying only to broadcasters in the State of New Jersey was issued by the Commission following the decision by the district court in *Players*. See Petition, p. 11.)

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
REASONS THE PETITION SHOULD BE DENIED	2
I. THERE IS NO BASIS UNDER RULE 11 FOR GRANTING CERTIORARI BEFORE JUDGMENT HERE	2
II. THE EVIDENTIARY RECORD IS NOT A SUFFICIENT BASIS FOR CERTIORARI BEFORE JUDGMENT HERE	4
III. THERE IS NO SUPPORT IN PRECEDENT FOR GRANTING CERTIORARI BEFORE JUDGMENT HERE	6
CONCLUSION	7

TABLE OF AUTHORITIES

CASES	Page
Bolling v. Sharpe, 347 U.S. 497 (1954)	7
Brown v. Board of Education, 347 U.S. 483 (1954)	7
44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996)	4
Greater New Orleans Broadcasting Ass'n v. U.S. 149 F.3d 334 (5th Cir. 1998)	2, 4, 5, 6
McCullogh v. Sociedad Nacional de Marineros, 372 U.S. 10 (1963)	6
McElroy v. Guagliardo, 361 U.S. 281 (1960)	6
Mistretta v. United States, 488 U.S. 361 (1989)	6
New Haven Inclusion Cases, 399 U.S. 392 (1970)	6
Players Intern., Inc. v. U.S., 988 F. Supp. 497 (D. N.J. 1997)	2, 4
United States v. Nixon, 418 U.S. 683 (1974)	6
Valley Broadcasting Co. v. United States, 107 F.3d 1328 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (1998)	2, 3

CONSTITUTION, STATUTES AND RULE	
U.S. Const. amend. I	2, 3, 5
Charity Games Advertising Clarification Act, 18 U.S.C. 1307(a)	5
Indian Casino Regulatory Act, 25 U.S.C. 2701, *et seq.*	5
18 U.S.C. 1304, as amended	2, 3, 4
Uniform Code of Military Justice, Article 2(11)	6
Sup. Ct. R. 11	2, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-721

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

PLAYERS INTERNATIONAL, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Third Circuit

---

BRIEF OF AMICI CURIAE VALLEY BROADCASTING COMPANY AND SIERRA BROADCASTING COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI BEFORE JUDGMENT

STATEMENT OF INTEREST

As indicated in the Motion for Leave to File Amicus Curiae Brief bound herewith, Amici Curiae [1] were the

---

[1] This brief was authored by counsel for *amici curiae* and no person or entity other than *amici curiae* made a monetary contribution to the preparation and submission of this brief.

plaintiffs in the case of *Valley Broadcasting Company v. United States,* 107 F.3d 1328 (9th Cir. 1997), cert. denied, 118 Sup. Ct. 1050 (1998), one of the three cases in which courts below have split on the question whether 18 U.S.C. Sec. 1304, as amended, which prohibits the broadcast of advertising for commercial casino gambling, violates the First Amendment. In *Valley* the 9th Circuit held the statute unconstitutional, as did the District Court of New Jersey in this case, *Players International, Inc. v. United States,* 988 F. Supp. 497 (D. NJ 1998), whereas in *Greater New Orleans Broadcasting Association, Inc. v. United States,* 149 F.3d 334 (5th Cir. 1998), petition for certiorari filed September 2, 1998, No. 98-387, the 5th Circuit upheld the constitutionality of the statute. Since effectively *Valley* will be reversed if this Court upholds the constitutionality of 18 U.S.C. Sec. 1304, as amended, in either *Greater New Orleans* or *Players,* Amici Curiae are interested parties, both on the merits and on the question whether the Court should grant certiorari before judgment in *Players.*

REASONS THE PETITION SHOULD BE DENIED

I. THERE IS NO BASIS UNDER RULE 11 FOR GRANTING CERTIORARI BEFORE JUDGMENT HERE.

Rule 11 of this Court's Rules states that a petition for certiorari before judgment in a court of appeals will be granted only upon a showing that the case is "of such imperative public importance" as to justify deviation from normal appellate practice and to require immediate determination in this Court. In its petition the Government does not even claim that this standard is met in this case, in fact it virtually concedes that the standard is not met. See Petition, p. 23.

This case is plainly not of such imperative public importance as to justify the extraordinary procedure pro-

posed by the Government here. As indicated in footnote 1 of the Motion for Leave to File Amicus Curiae Brief submitted herewith, Amici Curiae and the other broadcasters in Nevada have been carrying advertising for commercial casino gambling now for over 5 years, and such ads have been permitted in all of the 9th Circuit for over a year, without any noticeable reaction on the part of the public in any of those jurisdictions. Of course, one reason why the public may not consider the airing of these ads to be a matter of any particular importance may be that the same kind of ads for Indian casino gambling have been carried by broadcasters all over the country for the last ten years. Under the circumstances it is understandable that the public may simply consider that a casino gambling ad is a casino gambling ad, without regard to whether the party operating the casino is an Indian tribe, or a commercial licensee of a state, or a governmental entity, or a non-profit organization. In any event, the question at issue in this case is not one which has attracted very much public attention or interest.

Moreover, it should be noted that heretofore the Government has not been in any hurry to have the Court address this question of the constitutionality of 18 U.S.C. Sec. 1304, as amended. Although the 9th Circuit ruled in *Valley* that the statute violated the First Amendment, the Government did not raise the constitutional question in its petition for certiorari in that case last term. See Petition for a Writ of Certiorari in *United States v. Valley Broadcasting Co.*, No. 97-1047. How can the constitutional issue now be important enough to warrant review before judgment in this case, when last term it was not even important enough to warrant being raised in the *Valley* petition for certiorari?

II. THE EVIDENTIARY RECORD IS NOT A SUFFICIENT BASIS FOR CERTIORARI BEFORE JUDGMENT HERE.

The Government's only justification for its Petition for Certiorari Before Judgment is that the evidentiary record in this case is allegedly more extensive than the record in *Greater New Orleans*. Petition, pp. 13, 23. The evidentiary record in this case was developed after *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), says the Government, and is "more illuminating" than the record in *Greater New Orleans*. Petition, p. 23. Yet *Greater New Orleans* was remanded by this Court to the 5th Circuit specifically for reconsideration in light of *44 Liquormart*, on remand the Government was given an opportunity to supplement its earlier evidentiary submission, and the Government did so extensively, see *Greater New* Orleans, 149 F.3d at 338-339. Thus, the pertinent question would seem to be not which record is more extensive but whether the difference is of any significance to the resolution of the constitutional issue which is common to both cases.

The most noteworthy thing about the Government's now voluminous record evidence in both of these cases is that in each case the court below rejected that evidence as not being probative of the issues before the court. In this case the district court stated:

> Here, notwithstanding the articles and studies submitted, the government provides no evidentiary support beyond a mere assumption, that § 1304's commercial ban on gaming advertising will significantly reduce gambling addiction or violence.

988 F. Supp. at 506.

Likewise, in *Greater New Orleans*, although the divided 5th Circuit upheld the constitutionality of section 1304, as amended, the court stated, with respect to the Government's new evidence regarding compulsive gambling:

> The government's new argument suffers fatally, however, because none of its sources specifically connect casino gambling and compulsive gambling with broadcast advertising for casinos.

149 F.3d at 339.

In short, the Government is asking this Court to grant certiorari before judgment because its record is more extensive here than in *Greater New Orleans*, but in both cases the court below held that the Government's evidence was not probative of the issues. Surely, reviewing evidence which two courts have already found not to be probative is a job better left to the 3rd Circuit. Presumably this Court has better things to do with its time than that.

It should also be noted that this is not particularly a fact-driven case. Contrary to the implication of the Government's new evidence regarding compulsive gambling (see, e.g., footnotes 9-11 in *Greater New Orleans*, 149 F.3d at 338-339), the question at issue here is not whether there should be advertising of casino gambling over the air. For better or worse, that question was answered by the Congress in 1988 in the Indian Gaming Regulatory Act, 25 U.S.C. 2701, et seq., and the Charity Games Advertising Clarification Act, 18 U.S.C. 1307(a), where the Congress authorized broadcasters to carry ads for casino gambling run by Indian tribes, government entities, not-for-profit organizations, and commercial organizations as long as their gambling activities are occasional and ancillary to their principal business. The question at issue here is whether under the First Amendment the Congress can make a law authorizing broadcasters to carry commercial announcements for one group of advertisers and prohibit them from carrying the same commercial announcements for another group of advertisers, even though the ads for the second group are concededly truthful and about lawful activities. Whether the Government's record evi-

dence about compulsive gambling and the like is more extensive here or in *Greater New Orleans* is immaterial, because in the final analysis this case is not primarily about gambling, it is about speech.

III. THERE IS NO SUPPORT IN PRECEDENT FOR GRANTING CERTIORARI BEFORE JUDGMENT HERE.

The Government acknowledges that the constitutional issue in this case "does not have the manifest urgency" that led the Court to issue certiorari before judgment in cases such as *Mistretta v. United States*, 488 U.S. 361 (1989), and *United States v. Nixon*, 418 U.S. 683 (1974). (Petition, p. 23.) However, the Government goes on to argue, in its footnote 4 on pages 24-25 of its Petition, that on various occasions, the Court has granted certiorari prior to judgment in one case when another case before the Court "presented the same or similar issues and the Court's resolution of those issues would benefit from concurrent review of the case pending in the court of appeals." The Government cites four cases for this statement, but none of the cases cited supports such a broad reading of the Court's prior practice with respect to granting certiorari before judgment.

The first two cases cited, *New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970), and *McCullough v. Sociedad Nacional de Marineros*, 372 U.S. 10, 12 (1960), were both situations where the district court case involved *the same transaction* as the circuit court case before this Court, and it was necessary for the Court to decide both cases in order to bring closure to the transaction. The third case, *McElroy v. Guagliardo*, 361 U.S. 281, 283 (1960), was one of four cases decided the same day presenting different questions under Article 2(11) of the Uniform Code of Military Justice, which provided for trial by court-martial of "all persons serving with, employed by, or accompanying the armed forces outside the

United States", concerning whether the statute could constitutionally be applied in peacetime. Although one of the cases was pending on appeal to a circuit court, the Court granted certiorari before judgment in that case in order to address all four cases under the statute at the same time. That action hardly supports a grant of certiorari before judgment here, where there is only one question at issue and there are already two circuit court decisions in conflict.

The fourth case cited by the Government, *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954) was a companion case to the case with perhaps the most "imperative public importance" of any decided by this Court in the twentieth century, *Brown v. Board of Education*, 347 U.S. 483 (1954), which prohibited the states from maintaining racially segregated public schools. *Bolling* raised the same issue and resulted in the same prohibition being applied to the District of Columbia. Needless to say, the grant of certiorari before judgment in *Bolling* is not a basis for such action in this case.

CONCLUSION

Under the Court's Rule 11 this case is not of such imperative public importance as to justify deviation from normal appellate practice, and under the Court's prior cases there is no basis for a grant of certiorari before judgment here. Accordingly, the Petition for Certiorari Before Judgment should be denied.

Respectfully submitted,

GERALD S. ROURKE
7501 Hackamore Drive
Potomac, MD 20854
(301) 983-0776
Counsel for Amici Curiae

December 1, 1998